IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ERIC SLATER	:	**CIVIL ACTION**
	:	
v.	:	
	:	
LIBERTY MUTUAL INSURANCE CO.	:	**NO. 98-1711**

MEMORANDUM ORDER

This is an insurance bad-faith action pursuant to 42 Pa. C.S.A. § 8371. Each party has moved to compel a deposition of the other's attorney, and each has moved for a protective order to prevent such a deposition.

The Federal Rules of Civil Procedure do not expressly prohibit a deposition by a party of another party's attorney. See Fed. R. Civ. P. 30(a)(1) (a party may take by deposition "the testimony of any person"). A court, however, for good cause may enter a protective order to prevent a deposition from being conducted. See Fed. R. Civ. P. 26(c).

Many courts have found that it is appropriate to grant such an order to prevent the deposition of a party's attorney by an adversary unless he can show that the information sought is relevant, non-privileged and critical to the preparation of the case and that there is no other way to obtain the information. See Boughton v. Cotter Corp., 65 F.3d 823, 830 n.10 (10th Cir. 1995); Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986); Dunkin' Donuts, Inc. v. Mandorico, 181 F.R.D. 208, 210 (D.P.R. 1998); Jones v. Bd. of Police Commissioners, 176

F.R.D. 625, 626 (W.D. Mo. 1997); Caterpillar Inc. v. Friedemann, 164 F.R.D. 76, 78 (D. Or. 1995); EEOC v. HBE Corp., 157 F.R.D. 465, 466 (E.D. Mo. 1994). See also Lebovic v. Nigro, 1997 WL 83735, at *1 (E.D. Pa. Feb. 26, 1997) (deposition of opposing counsel is “typically only permitted where a clear need is shown”); Kelling v. Bridgestone/Firestone, Inc., 170, 171 (D. Kan. 1994) ("[a]bsent an attorney’s advice being made an issue in the case, courts should exercise great care before permitting the deposition of an [opposing] attorney"). This is because a deposition of one’s attorney by an opposing party is inherently annoying, oppressive, disruptive and burdensome. "Such a deposition provides a unique opportunity for harassment, it disrupts the opposing attorney’s preparation for trial, and could ultimately lead to disqualification of opposing counsel if the attorney is called as a trial witness." Marco Island Partners v. Oak Development corp., 117 F.R.D. 418, 420 (N.D. Ill. 1987).

Defendant states that plaintiff’s attorney communicated with a number of defendant’s employees in connection with his handling of the underlying underinsured motorist claim. Defendant contends it is “entitled to know whether [plaintiff’s attorney] intends to contradict any statement given by any representative of Liberty Mutual or whether he is in possession of any additional information which relates to the case.”

Defendant obviously has other means of discovering what its employees may have said to plaintiff's attorney. Plaintiff's attorney cannot meaningfully "contradict" a statement made by an employee of defendant unless he testifies as a witness at trial. There is absolutely no indication that plaintiff's attorney proposes to present himself as a witness and to do so would almost certainly require his disqualification. See Pa. Rules of Professional Conduct 3.7.

That a party wishes to ask another party's attorney whether he has "any additional information which relates to the case" does not remotely justify the deposition of the attorney. If it did, adversaries in virtually every case could compel the depositions of each other's attorney. Moreover, any relevant information which is known to a participating attorney in a pending case and is not protected by the attorney-client privilege or work-product doctrine can be discovered by other means such as interrogatories and requests for admission or production directed to the party.

Plaintiff seeks to depose defendant's counsel about his conduct of discovery in this action which plaintiff contends further evinces defendant's bad faith conduct towards plaintiff. Plaintiff asserts that defense counsel unilaterally canceled depositions and has not conducted discovery in an appropriate manner. According to a letter from plaintiff's attorney to

defense counsel, the authenticity of which is not challenged, plaintiff also seeks to depose defense counsel to "maintain a level playing field" since defense counsel seeks to depose him.

Plaintiff has attempted to notice the deposition of defense counsel. As the court noted in its order of September 24, 1998, notice is insufficient to compel the attendance of a deponent who is not a party or an officer, director or managing agent of a party. Moreover, the arguments of plaintiff in support of a protective order to prevent his attorney from being subject to deposition are well-taken. Even assuming that some particular act of defense counsel in the conduct of discovery may be relevant, there has been no showing that plaintiff cannot ascertain and present evidence of such an act without making a witness of defendant's attorney.

Discovery in this case has been quite contentious. The parties have filed an array of discovery motions on matters which ordinarily would not require court involvement. Counsel are admonished that whatever acrimony may exist between their clients, counsel are expected to ensure that discovery is conducted in a diligent, reasonable and professional manner and that any true dispute is resolved in a practical manner without the need for court intervention except as a last resort.

ACCORDINGLY, this day of January, 1999, upon consideration of plaintiff's Motion for Protective Order (Doc.

#24), defendant's Motion for Protective Order (Doc. #22), plaintiff's Motion to Compel Deposition of William C. Foster, Esq. (Doc #27) and defendant's Motion to Compel Deposition of Plaintiff's Counsel (Doc. #25), **IT IS HEREBY ORDERED** that the Motions to Compel are **DENIED** and the Motions for Protective Orders are **GRANTED**.

BY THE COURT:

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JAY C. WALDMAN, J.